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RHB BANK BHD

v.

MAJMEKAR HOLDINGS SDN BHD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN JC
[SUIT NO: D4-22-1459-2007]
24 APRIL 2009

C ***CIVIL PROCEDURE:*** *Summary judgment - Triable issues - Whether arose - Whether defendant had fair or reasonable probability of a real or bona fide defence in respect of claim - Whether application for summary judgment allowed*

D The plaintiff, RHB Bank Berhad ('the bank') applied for summary judgment in this application against the third defendant ('D3'). The bank's claim against D3 was founded on a personal guarantee dated 24 May 2005 executed by D3 jointly with the second and fourth defendants. In response to the plaintiff's claim, D3 E contended that (a) he did not sign the guarantee dated 24 May 2005; (b) he gave notice of withdrawal as a guarantor in November 2004 to D1, and that D1 duly gave notice to the bank to discharge him as a guarantor, which letter the bank acknowledged receipt of on 23 November 2004; (iii) that there F were matters relating to the grant of these facilities that warranted further investigation at trial by reason of a letter of offer from the bank to D1 dated 27 April 2006 because the said letter of offer appeared to bear D4's signature when D4 had passed away on 5 December 2005. This, he contended, suggested that there was G a 'conspiracy' or serious irregularity in the conduct of this account, which warranted investigation at trial.

Held:

(1) D3 merely denied having executed the guarantee. When D3's H affidavits were pared down to their essence, it was evident that the only fact of any real value that he affirmed to was the bare assertion that he did not sign the guarantee. There was no response to the fact of third parties having affirmed seeing him attest the guarantee. There was no factual matrix I surrounding the signing of the guarantee that appeared to warrant investigation. It was also contended that D3 wrote to

D4 seeking to withdraw himself as guarantor on 15 November 2004. The bank was advised of D3's request to withdraw himself as a guarantor for all of D1's facilities as of 23 November 2004. These events showed that D3 was conversant with and had, by his own admission, previously guaranteed D1's facilities and that this was not a case where D3's signature was utilised by unknown persons and copies of his NRIC card taken without his knowledge. D3 did not have a fair or reasonable probability of a real or *bona fide* defence in respect of his claim that he did not sign the personal guarantee of 24 May 2005. (paras 14, 15, 18, 19, 21)

(2) It was not disputed that the Bank cancelled a later facility afforded to D1 dated 27 April 2006. The Bank had discovered that D4 had passed away on 5 December 2005 and had written to D2 for an explanation as to how D4 could have signed the letter of offer dated 27 June 2006 when he had passed away prior to that date. As no satisfactory explanation was received, the facility was cancelled. It was evident from the correspondence from the bank to D1 that the bank discovered the irregularity in relation to D4's signature and brought it to the notice of D1, D2 and D3. The bank was evidently not a party to any 'conspiracy' to procure money from it. Further, the facts relating to the latter facility of 27 April 2006 did not in any manner relate to the signing of the guarantee by D3 in the presence of solicitors. There was no nexus or factual matrix between the two incidents and accordingly the fact that the letter of facility of 27 April 2006 was irregularly signed did not lend weight to D3's contention that his signature on the personal guarantee of 24 May 2005 was forged. The two matters were quite disparate. The plaintiff's claim for summary judgment was therefore allowed. (para 27)

(3) However, it appeared that some matters relating to the cancelled facility require explanation, primarily from D2 and possibly D3. In view of the foregoing, D3 was accorded conditional leave to defend, namely that he may defend the action upon payment into court of the sum of RM500,000. Although there was insufficient evidence to warrant D3 succeeding on a defence of forgery, the issue which clearly

A demonstrated forgery in respect of D4's signature warranted a trial. Accordingly, D4 was granted leave to defend unconditionally. (paras 29 & 30)

[Order accordingly.]

B **Case(s) referred to:**

Banque de Paris et Des Pays-Bas (Suisse) SA v. Costa de Naray [1984] 1 Lloyd's Rep 21

For the plaintiff - WY Wong; M/s Lee Hishammuddin Allen & Gledhill
C *For the defendants - RS Seelan; M/s RS Seelan, Parames & Co*

Reported by Suhainah Wahiduddin

JUDGMENT

D **Nallini Pathmanathan JC:**

[1] The plaintiff, RHB Bank Berhad ('the bank') applies for summary judgment in this application against only the third defendant, Arumugam a/l Renganathan ('D3').
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[2] The bank's claim against D3 is founded on a personal guarantee dated 24 May 2005 executed by D3 jointly with the 2nd and 4th defendants. The claim is for the sum of RM4,575,732.11 together with interest on that sum at the rate of
F 3.5% above Base Lending Rate calculated on monthly rests from 7 June 2007 until the date of realization.(1)

Salient Facts

G **[3]** Pursuant to letters of offer dated 15 April 2002, 13 May 2002, 1 April 2003, 15 April 2003, 12 May 2003, 25 May 2004 and 4 February 2005 ('letters of offer') all of which are exhibited in the plaintiff's application and two facility agreements dated 30 April 2002 and 24 May 2005 ('facility agreements') executed by D1 and Bank Utama (Malaysia) Berhad and the plaintiff, the
H plaintiff granted the following banking facilities to D1:

(a) A term loan facility of RM2 million (term loan facility');

(b) An overdraft facility of RM4 million ('overdraft facility'). The
I full terms of these facilities are set out in the loan documents which comprise exhibits to the affidavit in support of this application.

The term loan facility and overdraft facility were secured, *inter alia* by:

(i) Fixed deposits;

(ii) A memorandum of charge over fixed deposits and credit balances dated 30 April 2002 by D1 in favour of Bank Utama (Malaysia) Berhad;

(iii) A personal guarantee dated 24 May 2005 which comprises the subject matter of this application.

[4] Under the terms of the personal guarantee, D3, as did D2 and D4 (now deceased), jointly and severally guaranteed payment on demand of all sums due and owing by D1 under the term loan facility and overdraft facility up to the principal sum of RM5,800,000 and interest as fixed or determined by the bank.

[5] By a vesting order dated 8 April 2003 the assets of Bank Utama (Malaysia Berhad) were vested in the plaintiff with effect from 1 May 2003.

[6] On 27 March 2007 the plaintiff through its solicitors issued a letter to the 1st defendant, *inter alia*, cancelling the term loan facility and the overdraft facility and demanded payment of the amount due and owing by the 1st defendant.

[7] On 15 June 2007 the plaintiff through its solicitors issued a letter to the three guarantors, including D3, demanding payment of the sum guaranteed, which amounted to RM4,575,732.11 together with interest accruing at the rate of 3.5% per annum above the plaintiff's LBR on monthly rests from 7 June 2007 until the date of full realization. None of the guarantors responded to this demand.

D3's Response To The Plaintiff's Claim

[8] D3 raises a few issues in response to the plaintiff's claim. He contends in his three affidavits filed in this action that:

(a) He did not sign the guarantee dated 24 May 2005;

(b) He contends that he gave notice of withdrawal as a guarantor in November 2004 to D1, and that D1 duly gave notice to the bank to discharge him as a guarantor, which letter the bank acknowledged receipt of on 23 November 2004;

A (c) He contends that there are matters relating to the grant of these facilities that warrants further investigation at trial. Such investigation is warranted by reason of a letter of offer from the bank to D1 dated 27 April 2006 because the said letter of offer appears to bear D4's signature when D4 had passed
B away on 5 December 2005. This, he contends, suggests that there is a 'conspiracy' or serious irregularity in the conduct of this account, which warrants investigation at trial.

Issues (a): D3 Alleges That He Did Not Sign The Guarantee
C **– Does This Comprise A 'Triable' Issue?**

(b) D3's Attempt To Withdraw Or Discharge Himself As A Guarantor In November 2004

[9] In the defence filed in this action and his first affidavit dated
D 10 September 2008, D3 states that he did not sign the guarantee before a lawyer named Wong Rhen Yen on 24 May 2005. In his second affidavit dated 19 December 2008 (at paras 5 and 6) D3 states that as his initials do not appear on every page of the personal guarantee, it follows that he did not sign the guarantee
E before Wong Rhen Yen because it is the accepted practice that each page is initialed. In his third affidavit dated 10 April 2008, D3 exhibits a police report made on 4 March 2008. In that report, D3's complaint is that a third party signed the personal guarantee, with a signature appearing like his, in order to obtain a
F loan from the bank without his knowledge.

[10] The bank in response to the foregoing, procured an affidavit from Mr. Wong Rhen Yen, the solicitor ('the solicitor') who had attested D3's signature. The solicitor affirmed that he had
G witnessed both D2 and D3 executing the personal guarantee dated 24 May 2005. He further confirmed that prior to their executing the guarantee, he had inspected their respective identity cards and verified their identities first. To further corroborate his statement he annexed a statutory declaration from the previous
H manager of his office, one Vikneshvaran a/l Subramaniam. Mr Subramaniam states in the declaration *inter alia*, that in February 2005, D3 informed him that D1 had secured an additional overdraft facility from the bank and at his behest, the firm of Messrs. Dennis Nik & Wong was appointed by the bank to
I prepare the loan documentation for the facility. Mr. Subramaniam goes on to state that he witnessed D3 executing the guarantee

and annexed a copy of D3's identity card. The identity card is the valid national registration identity card of D3. It matches the number utilized by D3 himself in his affidavits.

Analysis

[11] D3 essentially seeks to raise an issue of fact which requires to be adjudicated by way of a trial, in alleging that he did not sign the personal guarantee of 24 November 2005. What however are the surrounding circumstances or factual matrix within which this issue is raised? A perusal of the affidavits will show that apart from the police report of 4 March 2008, there are no further facts put forward by D3 in support of this issue. The police report itself, contains no particulars or any other information save that D3 contends that his signature on the personal guarantee was not executed by him. The assertion made by D3 is therefore a bare assertion by which he merely states that he did not sign the guarantee. Is this sufficient to raise an issue of fact?

[12] In *Banque de Paris et Des Pays-Bas (Suisse) SA v. Costa de Naray* [1984] 1 Lloyd's Rep 21 Ackner LJ stated as follows:

> The mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, *ipso facto*, provide leave to defend; the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendant's having a real or *bona fide* defence (at p 23).

[13] And in an excerpt from *The Supreme Court Practice* 1997 Volume 1 Part 1 the commentary to O. 14 provides as follows:

> It is trite law that the mere assertion in an affidavit of a given situation does not, *ipso facto,* provide leave to defend since the defendant must satisfy the court that he has a fair or reasonable probability of showing a real or *bona fide* defence, ie, that his evidence is reasonably capable of belief (per Ackner LJ in *Banque de Pris et des Pays-Bas (Suisse) S.A. v. Costa de Naray* [1984] 1 Lloyd's Rep 21, 28 ... After reviewing all the authorities the Court of Appeal has laid down a definitive ruling that if the evidence of the defendant is incredible in any material respect, it cannot be said that there is a fair or reasonable probability that the defendant has a real or *bona fide* defence and judgment will be given to the plaintiff (*National Westminster Bank plc v. Daniel* [1993] 1 WLR 1453) following the *Banque de Paris* case ... Two

A tests are appropriate, namely "Is what the defendant says credible?" and "Is there a fair or reasonable probability of the defendant having a real or *bona fide* defence?" Where an issue of fact is raised, the first question must be answered in the affirmative before considering the second ...

B **[14]** From the foregoing passage it is evident that D3 has made bare assertions in his affidavits in relation to the issue of signing the guarantee. He merely denies having executed the guarantee. This brings the court to the next matter for assessment: "Is what the defendant says credible?" In order to ascertain this it is C necessary to consider D3's affidavits in conjunction with the affidavits of Wong Rhen Yen as well as the bank. In response to the assertion of D3, the bank produced the affidavit of the solicitor who attested D3's signature. The solicitor has affirmed that:

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(a) He met D3 together with D2;

(b) He examined D3's National registration card and verified his identity;

E (c) His office manager also confirms seeing D3 execute the document, and produces a copy of D3's guarantee.

[15] In short the plaintiff has rebutted the bare assertion made by D3 with clear evidence from a witness who saw him execute F the guarantee. What does D3 state in response? He merely maintains his earlier stance and denies attending at the offices of the solicitor. He neither provides any basis for his continued refutation, nor makes any attempt to explain the existence of a copy of his valid national registration card.

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[16] In examining both parties' affidavits, I have reminded myself that it is not acceptable for the court in summary judgment proceedings to undertake any sort of trial by affidavit. There can be no 'weighing' of the relative truth or otherwise of each parties' H affidavits. If the defendant shows a 'triable' issue, that is sufficient to entitle him to leave to defend.

[17] However there is a minimum evidential threshold that a potential defendant has to attain to enable him to procure leave to defend. He has to show the court that he genuinely harbours I a case which warrants going to trial. It cannot be sufficient to

simply make an allegation of 'fraud' or 'forgery' without more, and expect that that one allegation in itself will ensure that the matter goes to trial. To so hold would be to open the floodgates to debtors in the commercial world alleging 'fraud' and 'forgery' in response to genuine claims made against them with a view to delaying repayment of duly owed debts. The net effect on the commercial world would be detrimental.

[18] The issue in this case is whether D3 has in fact discharged the minimum threshold limit to show that he has a genuine and credible defence, as a consequence of which leave to defend should be granted. When his affidavits are pared down to their essence, it is evident that the only fact of any real value that he affirms to is the bare assertion that he did not sign the guarantee. There is no response to the fact of third parties having affirmed seeing him attest the guarantee. There is no factual matrix surrounding the signing of the guarantee that appears to warrant investigation.

[19] Apart from this it is also material that it is only after proceedings had been commenced that he denied that he had signed the guarantee. When the letter of demand dated 15 June 2006 was sent to D3, he did not deny signing the guarantee. It was only in March 2008 that he made a police report stating that a third party had forged his signature as guarantor. If D3 did not sign the guarantee, he would be expected to have complained about his wrongful inclusion as a guarantor at a considerably earlier time, and certainly by 15 June 2006.

[20] D3 also contends in his affidavits that he did in fact write to D4 seeking to withdraw himself as a guarantor on 15 November 2004. The bank was advised of D3's request to withdraw himself as a guarantor for all of D1's facilities as of 23 November 2004. This is not in dispute. However these events:

(i) Occurred prior to the execution of the personal guarantee on 24 May 2005, some six months later;

(ii) Shows that D3 was conversant with and had, by his own admission, previously guaranteed D1's facilities. This was not a case where D3' signature was utilized by unknown persons and copies of his NRIC card taken without his knowledge.

A (iii) This fact moreover does not provide any factual matrix to substantiate the allegation of a forgery of his signature on the personal guarantee dated 24 May 2005.

[21] As such I was unable to conclude that what D3 said was
B credible. This then brings me to the final question I have to ask myself in relation to this issue: "Is there a fair or reasonable probability of the defendant having a real or *bona fide* defence?" Given the analysis above, I was unable to so conclude. It did not appear to me that D3 had a fair or reasonable probability of a real
C or *bona fide* defence in respect of his claim that he did not sign the personal guarantee of 24 May 2005.

Issue (c): The Alleged 'Irregularity' Or Conspiracy In Relation To The Letter Of Offer Dated 27 April 2006 Accorded To D1

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[22] It is not in dispute that the bank cancelled a later facility afforded to D1 dated 27 April 2006. This facility does not comprise the subject matter of this claim.

E **[23]** The reason for the cancellation of this latter facility is as follows. The letter of offer in relation to this facility was signed and thereby accepted by D2 and D4 in June 2006, more precisely 27 June 2006. However in October 2006, the bank discovered that D4 had passed away on 5 December 2005. The bank
F therefore wrote to D2, the remaining director of D1 for an explanation as to how D4 could have signed the letter of offer dated 27 June 2006 when he had passed away prior to that date, in December 2005. As no satisfactory explanation was received, the facility was cancelled.

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[24] In short, the bank discovered that the facility had been obtained in irregular circumstances as D4 could not have signed and accepted the said facility as he was not alive at the material time. Serious questions arose about the veracity of D4's signature.

H **[25]** On this basis, D3 maintains that given the suspicious circumstances surrounding D4's signature, this is a factor which warrants investigation in relation, in like manner, to his liability, given his contention that he did not sign the guarantee.

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[26] The issue that arises for consideration here is whether the circumstances surrounding the false signature of D4 adds to or provides a factual matrix giving basis to D3's contention that he did not sign the guarantee, thereby warranting this matter to go to trial?

[27] It is evident from the correspondence from the bank to D1 that the bank discovered the irregularity in relation to D4's signature and brought it to the notice of D1, D2 and D3. The bank is evidently not a party to any 'conspiracy' to procure money from it. How does this factual matrix impinge or relate to D3's contention that he did not 'sign' the guarantee, given the affidavits of Wong Rhen Yen?

[28] The facts relating to the latter facility of 27 April 2006 do not in any manner relate to the signing of the guarantee by D3 in the presence of solicitors and giving a copy of his national registration card to the solicitors when signing the guarantee for purposes of verification of his identity. There is no nexus or factual matrix between the two incidents and accordingly the fact that the letter of facility of 27 April 2006 was irregularly signed does not lend weight to D3's contention that his signature on the personal guarantee of 24 May 2005 was forged. The two matters are quite disparate. Moreover the fact that Wong Rhen Yen witnessed the signature of D3 and procured a copy of his national registration card addresses any possibility of D3's signature being forged. For this reason, I conclude that no triable issue is raised under this head either. The plaintiff's claim for summary judgment is therefore allowed.

OR

[29] Given these latter circumstances it appears that some matters relating to the cancelled facility rather than D3's guarantee require explanation, primarily from D2 and possibly D3. Notwithstanding this, given the tenor of D3's affidavit and the complete lack of detail or particulars in relation to his contention, particularly in view of Wong Rhen Yen's affidavit, D3's defence appears to be a 'shadowy' defence. Given the entirety of the evidence there is every reason to conclude that it is a 'sham' defence and I am prepared very nearly to give judgment for the plaintiff. In view of the foregoing, I order that D3 is accorded conditional leave to defend, namely that he may defend the action

upon payment into court of the sum of RM500,000. This appeared to me a reasonable condition to impose, given that the sum named is only a fraction of the sum claimed against D3.

OR

[30] Given these latter circumstances, it appears that some matters relating to the cancelled facility dated 27 June 2006 requires explanation. This may well have some bearing on D3's contention that the signature on the personal guarantee of 24 May 2005 is not his, in like manner to the fact that the signature on the letter of offer of 25 June 2006 was not that of D4 who had passed away and was therefore forged. While the nexus does not appear at all clear, and Wong Rhen Yen's affidavit appears to support the bank's contention that D3 did sign the guarantee, there remains a possibility in view of the forgery of D4's signature, that D3's signature is not his. This is not a matter which this court can weigh or decide on the basis of the affidavit evidence before it. Although I had earlier concluded that there was insufficient evidence to warrant D3 succeeding on a defence of forgery, this last issue which clearly demonstrates forgery in respect of D4's signature warrants this matter going to trial. Accordingly D4 is granted leave to defend unconditionally. Costs in the cause.